Office - Supreme Court, U.S.
FILED
AUG 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2405

In the Supreme Court of the United States

OCTOBER TERM, 1982

PASS WORD, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

STEPHEN A. SHARP
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether, in a license revocation proceeding before the Federal Communications Commission in which the right to a hearing is waived, the licensee must raise any objection to the combination of investigatory and adjudicatory functions prior to the time when the Commission renders its decision on the merits.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Adams v. *United States*, 302 F. 2d 307 4

Curtis Publishing Co. v. *Butts*, 388 U.S. 130 7

Duffield v. *Charleston Area Medical Center, Inc.*, 503 F. 2d 512 4

Getty Oil Co. v. *Andrus*, 607 F. 2d 253 ..... 5, 6

International Paper Co. v. *FPC*, 438 F. 2d 1349, cert. denied, 404 U.S. 827 4

Kramer v. *United States*, 166 F. 2d 515 4

Marcus v. *Director, Office of Workers' Compensation Programs*, 548 F. 2d 1044 4

Mullin, Connor and Rhyne, 41 Rad. Reg. 2d (P & F) 1681 ..... 2, 3, 4

Pass Word, Inc., 61 F.C.C. 2d 410 2

Wilson & Co. v. *United States*, 335 F. 2d 788, cert. denied, 380 U.S. 951, remanded, 382 U.S. 454 ..... 5, 6

Page

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* :

5 U.S.C. 554(d) 3, 7

5 U.S.C. 557(a) 7

Communications Act of 1934, 47 U.S.C. 151 *et seq.* :

47 U.S.C. 312(c) 2

47 U.S.C. 405 7

47 C.F.R. Part 1:

Section 1.92(b) 2

Section 1.92(d) 2

Miscellaneous:

Amendment of Part 1 of the Commission's Rules Concerning Revocation and Cease and Desist Proceedings, 25 Fed. Reg. 12602 (1960) 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2405

PASS WORD, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 673 F. 2d 1363. The Commission's order revoking petitioners' licenses (Pet. App. 1b-95b) is reported at 76 F.C.C. 2d 465, and its opinion denying reconsideration (Pet. App. 1c-24c) is reported at 86 F.C.C. 2d 437.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1982. The petition for a writ of certiorari was filed on July 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Pass Word, Inc. and Rodney J. Bacon (who conducted business under the name Coeur D'Alene Answering Service) held licenses from the Federal Communications Commission which permitted them to provide paging, mobile telephone, and answering services. Petitioner Bacon is the sole owner of Coeur D'Alene, as well as the president, chief operating officer, and owner of 49.5% of the stock of Pass Word (Pet. App. 2a, 2b-3b). On September 28, 1976, the Commission issued an order to show cause why those licenses should not be revoked on the ground that Bacon had made numerous misrepresentations to the Commission in connection with petitioners' applications for additional facilities. See *Pass Word, Inc.*, 61 F.C.C. 2d 410 (1976).

On February 11, 1977, petitioners were granted permission to waive the hearing to which they were entitled under Section 312(c) of the Communications Act of 1934, 47 U.S.C. 312(c), and instead to submit a statement in explanation pursuant to Section 1.92(b) of the Commission's rules, 47 C.F.R. 1.92(b) (see Pet. App. 9b). Section 1.92(d) (47 C.F.R.), provides, in part, that when a hearing is waived, it is the Commission's practice to determine whether revocation is warranted "on the basis of all of the information available to it from any source." When the predecessor of this provision was adopted in 1960, the Commission announced that the waiver of a hearing also would cause the Commission to dispense with observance of the separation of administrative functions that would have been required in the event of a hearing. *Amendment of Part 1 of the Commission's Rules Concerning Revocation and Cease and Desist Proceedings*, 25 Fed. Reg. 12602 (1960).[1]

---

[1]The Commission again announced the consequences of a waiver of hearing in a revocation case in *Mullin, Connor & Rhyne*, 41 Rad. Reg.

In accordance with this announced practice, after petitioners' waiver, the Commission's Common Carrier Bureau requested and obtained further information from petitioners (Pet. App. 9b) and then drafted a recommended order of revocation. The Commission discussed that recommendation at an open meeting on December 19, 1979, and finally adopted it on March 4, 1980. The Commission found, as Bacon conceded, that he had made repeated misrepresentations in petitioners' applications. After considering petitioners' mitigation statement, which urged a lesser sanction than revocation, the Commission concluded that petitioners' explanation did not mitigate the "flagrant * * * disregard of licensee responsibility" and that revocation was therefore the "only appropriate remedy" (Pet. App. 91b).

Petitioners sought reconsideration and claimed for the first time that the participation of the Common Carrier Bureau constituted a mixing of prosecutorial and decision-making functions forbidden by the Administrative Procedure Act ("APA"), 5 U.S.C. 554(d). The Commission denied reconsideration (Pet. App. 1c-24c), relying upon its established practice, first announced in 1960 and reiterated in *Mullin, Connor & Rhyne*, 41 Rad. Reg. 2d (P & F) 1681 (Dec. 21, 1977), that when the subject of a revocation proceeding waives a hearing, the Commission may receive information and advice from the Bureau with responsibility over the matter prior to designation for hearing (Pet. App. 9c-10c).

2d (P & F) 1681 (Dec. 21, 1977). After referring specifically to separation of functions, the Commission stated that "[w]aiver of the right to a hearing encompasses waiver of procedural rights associated with hearing cases, except that the Commission's order must contain a statement of its findings and the grounds and reasons therefor" (*id.* at 1682).

The court of appeals affirmed (Pet. App. 1a-4a). It held (*id.* at 4a) that the Commission had not abused its discretion in choosing the sanction of revocation "in view of Bacon's course of conduct [and] his repeated knowing and deliberate misrepresentations to the agency." The court also rejected petitioners' argument concerning the separation of functions (*id.* at 2a-3a), holding that petitioners "knew or should have known" of the Commission's "routine and published" practice in cases such as this and should have interposed a timely challenge instead of raising their objection for the first time in a petition for reconsideration (*id.* at 3a).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with decisions of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. The court of appeals correctly applied the well-established principle, which petitioners overlook, that a claim of disqualification of a government employee or official must be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. See, *e.g.*, *Marcus* v. *Director, Officer of Workers' Compensation Programs*, 548 F. 2d 1044, 1051 (D.C. Cir. 1976); *Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F. 2d 512, 515-516 (4th Cir. 1974); *Kramer* v. *United States*, 166 F. 2d 515, 518 (9th Cir. 1948); *Adams* v. *United States*, 302 F. 2d 307, 309 (5th Cir. 1962). This principle applies where the alleged ground for disqualification is the participation by the same government employee in both prosecutorial and decisionmaking functions. *International Paper Co.* v. *FPC*, 438 F. 2d 1349, 1357 (2d Cir.), cert. denied, 404 U.S. 827 (1971). Permitting a party to "suppress his misgivings while waiting anxiously to see whether the decision" is favorable "would only countenance

and encourage unacceptable inefficiency in the administrative process." *Marcus* v. *Director, Office of Workers' Compensation Programs, supra,* 548 F. 2d at 1051.

The record in this case amply supports the court of appeals' conclusion that petitioners knew or should have known far in advance of the Commission's decision that the Commission might receive information and advice from the Common Carrier Bureau. The Commission had publicly announced its policy concerning this matter on at least two occasions. The Commission's most recent announcement in *Mullin, Connor & Rhyne, supra,* had been issued shortly after petitioners' waiver and nearly two years before their case was brought before the Commission. Moreover, in a pleading filed in this very case, the Common Carrier Bureau had stated that it could "investigate and make inquiries after waiver and is obligated to advise the Commission regarding disposition of the revocation issues" (C.A. App. 114).[2] Nevertheless, petitioners did not object to the practice until after the Commission's decision went against them. Faced with this record, the court of appeals correctly concluded (Pet. App. 2a-3a) that petitioners had waived any objection to the Common Carrier Bureau's participation.

2. There also is no merit to petitioners' contention (Pet. 9-13) that the decision in this case conflicts with *Wilson & Co.* v. *United States,* 335 F. 2d 788 (7th Cir. 1964), cert. denied, 380 U.S. 951 (1965), remanded, 382 U.S. 454 (1966), and *Getty Oil Co.* v. *Andrus,* 607 F. 2d 253 (9th Cir. 1979).

---

[2]Petitioners disagree (Pet. 12-13) with the assertions of the court below (Pet. App. 3a) that petitioners' objection to the FCC's procedures came only "when alteration of the mode of proceeding in this case was impossible." What petitioners are in effect insisting upon, however, is that the Commission's Office of Opinions and Review must duplicate the task already performed by other staff personnel in appraising the record and preparing a recommended opinion and that thereafter the Commission must again devote its attention to the matter.

In *Wilson & Co.*, parties to an FCC rulemaking proceeding objected for the first time on appeal to the ex parte participation by the Common Carrier Bureau counsel in the Commission's decision. The court of appeals held (335 F. 2d at 794) that the objection had not been waived because the court was "not persuaded * * * that petitioners were on notice during the hearing that such participation might occur and hence should have filed their objections with the Commission." The court did not hold that a party on notice of such possible participation could wait until the Commission had acted before voicing an objection.[3]

There is also no conflict between the decision below and *Getty Oil Co.* In that case, the court of appeals upheld certain awards of geothermal steam leases by the Secretary of the Interior. The court recognized (607 F. 2d at 255-256; emphasis added) that administrative decisions should not be overturned "unless the administrative body not only has erred but had erred *against objection made at the time appropriate under its practice.*" The court then concluded (*id.* at 256), based upon the regulations concerning the relevant procedures and the facts of that particular case, that certain objections to the awarding of the leases had been "sufficiently raised." The court did not hold that a party in an administrative proceeding is entitled to wait until after final agency action before raising new arguments or objections.

---

[3]In a footnote in another portion of the opinion, the court observed (335 F. 2d at 797 n.4) that a provision of the Commission's rules stated that "the Common Carrier Bureau 'assists, advises and makes recommendations to the Commission.' " Petitioners interpret (Pet. 10 & n.13) this statement to mean that the objecting parties in *Wilson & Co.* were on notice concerning the Common Carrier Bureau's possible participation. As noted above, however, the court found (335 F. 2d at 794) precisely the opposite.

3. Petitioners' reliance (Pet. 11-12) upon 47 U.S.C. 405 is equally misplaced. That statute provides that a petition for rehearing by the Commission is not a "condition precedent to judicial review" unless "the party seeking such review * * * relies on questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass." That provision obviously does not mean that a party may do nothing until the rehearing stage. It was not intended to forgive all prior procedural defaults.

4. Relying upon *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), petitioners maintain (Pet. 13-20) that they did not knowingly and intelligently waive their right to a separation of prosecutorial and adjudicatory functions when they elected to proceed without a hearing. This argument is also without merit.

In *Curtis Publishing Co.* v. *Butts, supra*, a libel action against a publisher, this Court held that the defendant had not waived recently recognized constitutional defenses by failing to raise them before trial. Based upon the uncertain state of the law at the time of trial, the Court concluded (388 U.S. at 143-145) that defendant's lawyer had not acted unreasonably. Here, by contrast, as the court of appeals recognized (Pet. App. 3a), petitioners "knew or should have known * * * that it is the FCC's general practice not to require separation of functions after a waiver of hearing."

5. Finally, petitioners maintain (Pet. 20-22) that a party has a right to separation of functions under the APA, 5 U.S.C. 554(d), even when there is no evidentiary hearing. This argument lacks merit. Section 554(d) applies only to "the decision, recommended decision, or agency review pursuant to [5 U.S.C.] 557," and the latter provision applies only "when a hearing is required to be conducted in accordance with [5 U.S.C.] 556" (5 U.S.C. 557(a). Thus, when a hearing is waived, Section 554(d) is inapplicable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN A. SHARP
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

Federal Communications Commission

AUGUST 1982

DOJ-1982-08